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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

) Case No. 3:18-cv-01490-JD
ALLISON FEJERAN, individually and)
on behalf of all others similarly) <u>CLASS ACTION</u>
situated,)
) COMPLAINT FOR DAMAGES
Plaintiff,) AND INJUNCTIVE RELIEF
) PURSUANT TO THE
) TELEPHONE CONSUMER
vs.) PROTECTION ACT, 47 U.S.C. §
) 227, ET SEQ.
FIVE STARS LOYALTY, INC., and)
DOES 1 through 10, inclusive, and) <u>DEMAND FOR JURY TRIAL</u>
each of them,)
)
Defendant.)
)

1 ///

2 ///

FIRST AMENDED CLASS ACTION COMPLAINT¹

3
4 Plaintiff Allison Fejeran brings this class action against Defendant Five Stars
5 Loyalty, Inc., and alleges as follows upon personal knowledge as to herself and her
6 own acts and experiences, and, as to all other matters, upon information and belief,
7 including investigation conducted by her attorneys.
8

NATURE OF THE ACTION

9
10
11 1. This putative class action under the Telephone Consumer Protection
12 Act, 47 U.S.C. § 227 et seq., (“TCPA”), stems from Defendant’s knowing and willful
13 violations of the TCPA.
14

15 2. The case arises from the transmission of text messages to the cellular
16 telephones of Plaintiff and members of the class for the purpose of promoting
17 Defendant’s services and mobile application.
18

19 3. Defendant operates a rewards and marketing program through a
20 mobile application. To drum-up new business and encourage consumers to download
21 its application, Defendant engages in intrusive telemarketing campaigns.
22

23 4. Defendant is well-aware of the restrictions imposed by the TCPA, and
24 has been previously sued for violating the TCPA.
25

26 ¹ On May 14, 2018, Defendant filed a Motion to Dismiss Plaintiff’s Complaint (“Motion to Dismiss”) pursuant to Federal Rule of Civil Procedure 12(b)(6). [ECF NO. 18]. Pursuant to Fed. R. Civ. P. 15(a)(1), Plaintiff hereby amends her complaint as a matter of course thereby mooting Defendant’s Motion to Dismiss.
27
28

1 5. Nevertheless, Defendant engages in illegal telemarketing, targeting
2 individuals nationwide, without their prior express consent and little regard for their
3 privacy.
4

5 6. Through this putative class action, Plaintiff seeks injunctive relief to
6 halt Defendant's illegal conduct which has resulted in the invasion of privacy,
7 harassment, aggravation, and disruption of the daily life of thousands of individuals
8 nationwide. Plaintiff also seeks statutory damages on behalf of himself and members of
9 the class, and any other available legal or equitable remedies resulting from the illegal
10 actions of Defendant.
11
12

13 **JURISDICTION AND VENUE**

14 7. This Court has federal question subject matter jurisdiction pursuant
15 to 28 U.S.C. § 1331 and 47 U.S.C. § 227.
16

17 8. Venue in this judicial district is proper under 28 U.S.C. §
18 1391(b)(1), because Defendant resides in this District.
19

20 9. The Court has personal jurisdiction over Defendant because it
21 conducts business in this state, and its principle place of business is in this District.
22

23 **PARTIES**

24 10. Plaintiff is a natural person who, at all times relevant to this action, was
25 a resident of the State of Texas.

26 11. Defendant is a Delaware limited liability company whose principal
27 office is located at 340 Bryant St #300, San Francisco, CA 94107. Defendant directs,
28

1 markets, and provides its business activities throughout the United States.

2 **THE TELEPHONE CONSUMER PROTECTION ACT**

3
4 12. The TCPA regulates and restricts the use of automatic telephone
5 equipment.

6
7 13. The TCPA protects consumers from unwanted calls that are made with
8 autodialers and/or prerecorded messages.

9
10 14. The TCPA prohibits: (1) any person from calling a cellular telephone
11 number; (2) using an automatic telephone dialing system or prerecorded message; (3)
12 without the recipient's prior express consent. 47 U.S.C. § 227(b)(1)(A).

13
14 15. The TCPA defines an "automatic telephone dialing system" ("ATDS")
15 as "equipment that has the capacity - (A) to store or produce telephone numbers to be
16 called, using a random or sequential number generator; and (B) to dial such numbers."
17 47 U.S.C. § 227(a)(1).

18
19 16. In an action under the TCPA, a plaintiff must only show that the
20 defendant "called a number assigned to a cellular telephone service using an automatic
21 dialing system or prerecorded voice." *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp.
22 2d 1316, 1319 (S.D. Fla. 2012), *aff'd*, 755 F.3d 1265 (11th Cir. 2014).

23
24 17. The Federal Communications Commission ("FCC") is empowered to
25 issue rules and regulations implementing the TCPA. According to the FCC's findings,
26 calls in violation of the TCPA are prohibited because, as Congress found, automated or
27 prerecorded telephone calls are a greater nuisance and invasion of privacy than live
28

1 solicitation calls, and such calls can be costly and inconvenient. The FCC also
 2 recognized that wireless customers are charged for incoming calls whether they pay in
 3 advance or after the minutes are used. *Rules and Regulations Implementing the*
 4 *Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order,
 5 18 FCC Rcd 14014 (2003).
 6

7
 8 18. In 2012, the FCC issued an order tightening the restrictions for
 9 automated telemarketing calls, requiring “prior express written consent” for such calls
 10 to wireless numbers. *See In the Matter of Rules & Regulations Implementing the Tel.*
 11 *Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1838 ¶ 20 (Feb. 15, 2012)(emphasis
 12 supplied).
 13

14 19. To obtain express written consent for telemarketing calls, a defendant
 15 must establish that it secured the plaintiff’s signature in a form that gives the plaintiff a
 16 “‘clear and conspicuous disclosure’ of the consequences of providing the requested
 17 consent....and having received this information, agrees unambiguously to receive such
 18 calls at a telephone number the [plaintiff] designates.” *In re Rules & Regulations*
 19 *Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1837 ¶ 18, 1838
 20 ¶ 20, 1844 ¶ 33, 1857 ¶ 66, 1858 ¶ 71 (F.C.C. Feb. 15, 2012).
 21

22
 23 20. The TCPA regulations promulgated by the FCC define
 24 “telemarketing” as “the initiation of a telephone call or message for the purpose of
 25 encouraging the purchase or rental of, or investment in, property, goods, or services.” 47
 26 C.F.R. § 64.1200(f)(12). In determining whether a communication constitutes
 27
 28

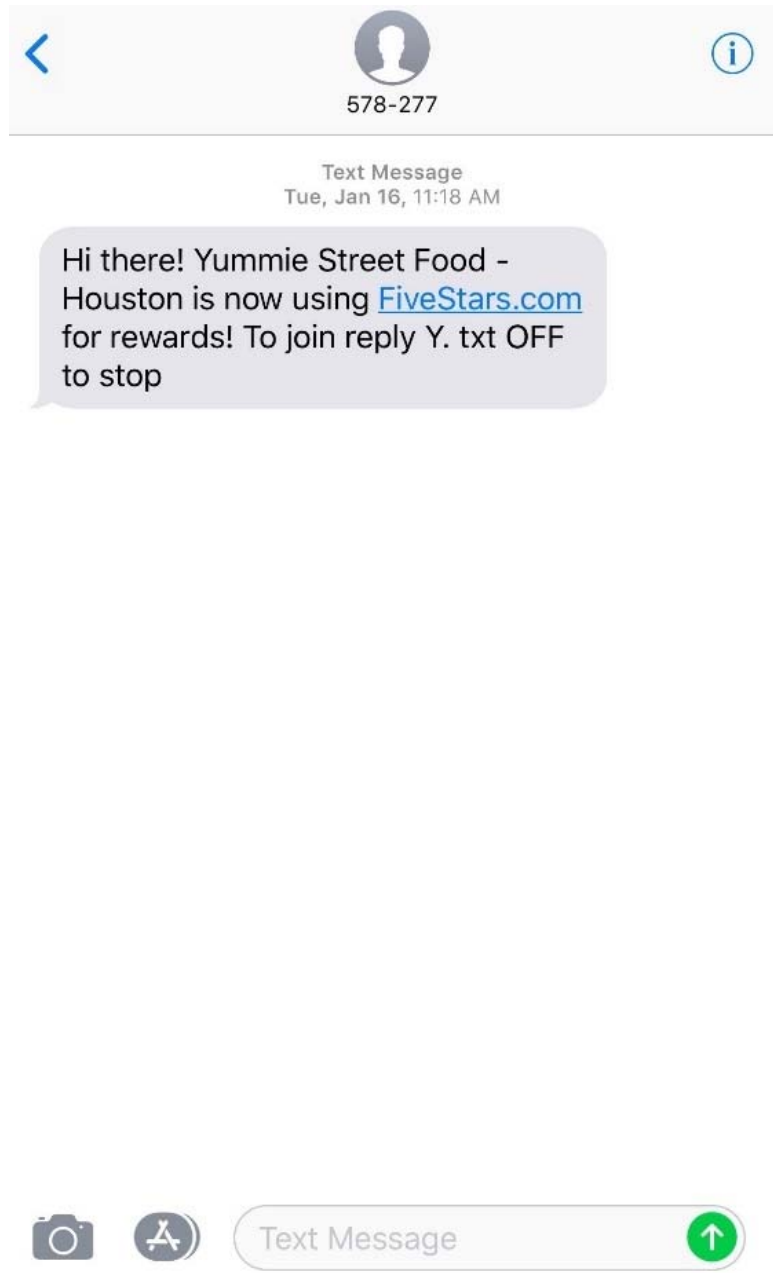
1 telemarketing, a court must evaluate the ultimate purpose of the communication. *See*
2 *Golan v. Veritas Entm't, LLC*, 788 F.3d 814, 820 (8th Cir. 2015).

3
4 21. “Neither the TCPA nor its implementing regulations ‘require an
5 explicit mention of a good, product, or service’ where the implication of an improper
6 purpose is ‘clear from the context.’” *Id.* (citing *Chesbro v. Best Buy Stores, L.P.*, 705
7 F.3d 913, 918 (9th Cir. 2012)).

8
9 22. “‘Telemarketing’ occurs when the context of a call indicates that it was
10 initiated and transmitted to a person for the purpose of promoting property, goods, or
11 services.” *Golan*, 788 F.3d at 820 (citing 47 C.F.R. § 64.1200(a)(2)(iii); 47 C.F.R. §
12 64.1200(f)(12); *In re Rules and Regulations Implementing the Telephone Consumer*
13 *Protection Act of 1991*, 18 F.C.C. Rcd at 14098 ¶ 141, 2003 WL 21517853, at *49).

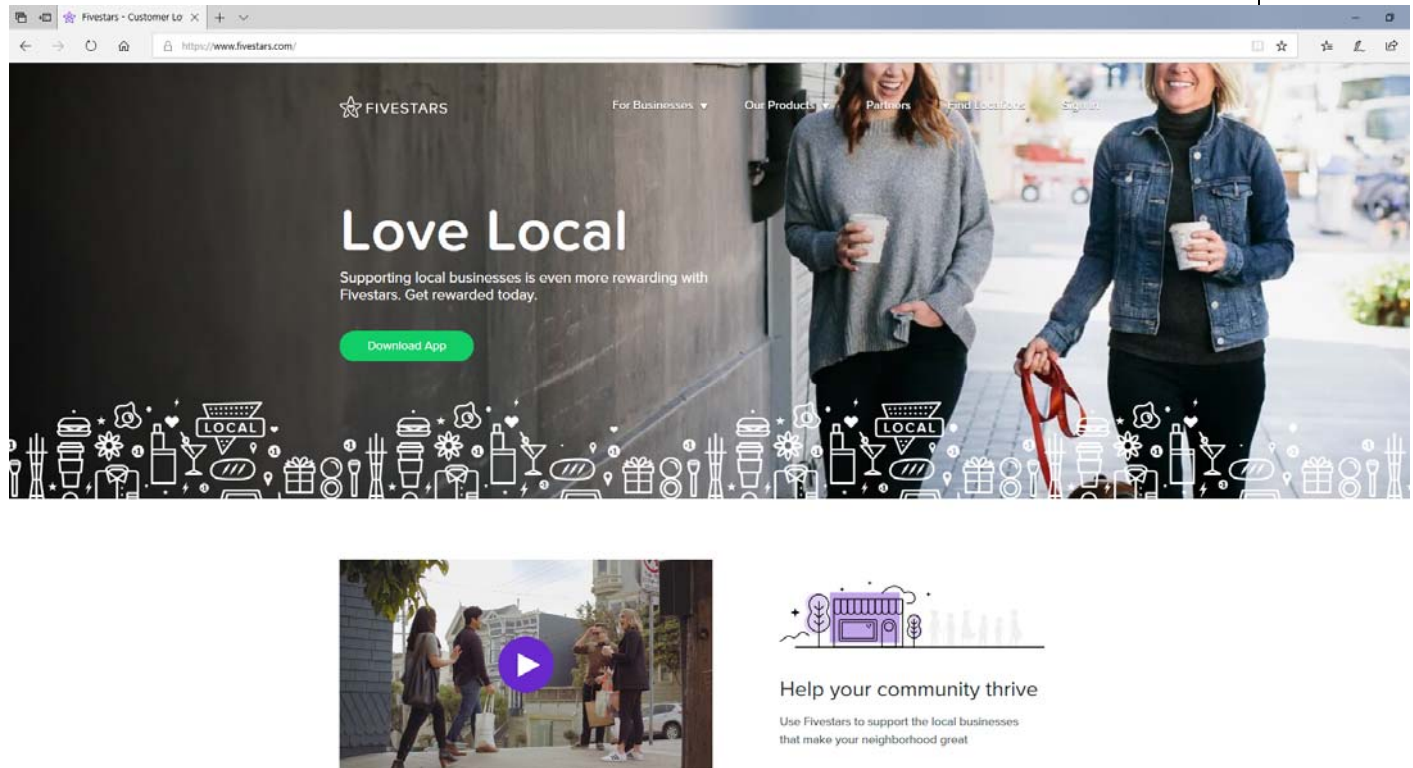
14
15 23. The FCC has explained that calls motivated in part by the intent to sell
16 property, goods, or services are considered telemarketing under the TCPA. *See In re*
17 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*,
18 18 FCC Rcd. 14014, ¶¶ 139-142 (2003). This is true whether call recipients are
19 encouraged to purchase, rent, or invest in property, goods, or services during the call *or*
20 *in the future. Id.*

21
22 24. In other words, offers “that are part of an overall marketing campaign
23 to sell property, goods, or services constitute” telemarketing under the TCPA. *See*
24 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of*
25 *1991*, 18 FCC Rcd. 14014, ¶ 136 (2003).



28. Defendant's text message constitutes telemarketing because it promotes Defendant's goods and services, including its mobile application.

29. The hyperlink contained within the text message ([fivestars.com](https://www.fivestars.com)) is a link to Defendant's website, where Defendant promotes its good and services, including its mobile application as depicted below.



30. At no point in time did Plaintiff provide Defendant with her express written consent to be contacted by text messages using an ATDS.

31. At no point in time did Plaintiff provide Defendant with her express consent to be contacted by text messages using an ATDS.

32. At no point in time did Plaintiff provide Yummie Street Food with her express written consent to be contacted by text messages using an ATDS.

33. At no point in time did Plaintiff provide Yummie Street Food with her express consent to be contacted by text messages using an ATDS.

34. Plaintiff has never had any type of relationship with Defendant.

35. Plaintiff has never had any type of relationship with Yummie Street

1 Food.

2 36. Plaintiff has never provided her telephone number to Defendant.

3 37. Plaintiff has never provided her telephone number to Yummie Street
4 Food.

5 38. Plaintiff is the subscriber and/or sole user of the cellular telephone
6 number that received the offending text messages.

7 39. Upon information and belief, Defendant caused the same or similar
8 text messages to be transmitted to the cellular telephones of consumers throughout the
9 country. Many recipients of Defendant's text spam have voiced their complaints on the
10 Internet. A small sample of these complaints are depicted below.

- 11 • 578-277 texted me asking to confirm I signed up for
12 "fivestars, the reward program for local businesses". No I
13 didn't I don't own a business.
- 14 • 578-277 texted me asking to confirm I signed up for
15 "fivestars, the reward program for local businesses. I
16 never sign up with FiveStars. I even don't know what it is.
- 17 • It hijacked my text messages. It wouldn't let my messages
18 be delivered and sent the message below to me. Isn't this
19 kind of stuff illegal? Fivestars Alerts: Sorry, please try
20 again or visit support.fivestars.com for help. Std
21 msg&data rates may apply.²

22 40. The impersonal and generic nature of Defendant's text message
23 establishes that Defendant utilized an ATDS in transmitting the messages. *See Jenkins*

24
25
26
27
28 ² <https://800notes.com/Phone.aspx/1-578-277-0000>; (last accessed on May 29, 2018).

1 v. *LL Atlanta, LLC*, No. 1:14-cv-2791-WSD, 2016 U.S. Dist. LEXIS 30051, at *11
2 (N.D. Ga. Mar. 9, 2016) (“These assertions, combined with the generic, impersonal
3 nature of the text message advertisements and the use of a short code, support an
4 inference that the text messages were sent using an ATDS.”) (citing *Legg v. Voice Media*
5 *Grp., Inc.*, 20 F. Supp. 3d 1370, 1354 (S.D. Fla. 2014) (plaintiff alleged facts sufficient
6 to infer text messages were sent using ATDS; use of a short code and volume of mass
7 messaging alleged would be impractical without use of an ATDS); *Kramer v. Autobytel,*
8 *Inc.*, 759 F. Supp. 2d 1165, 1171 (N.D. Cal. 2010) (finding it “plausible” that defendants
9 used an ATDS where messages were advertisements written in an impersonal manner
10 and sent from short code); *Robbins v. Coca-Cola Co.*, No. 13-CV-132-IEG NLS, 2013
11 U.S. Dist. LEXIS 72725, 2013 WL 2252646, at *3 (S.D. Cal. May 22, 2013) (observing
12 that mass messaging would be impracticable without use of an ATDS)).

13
14
15
16
17 41. Specifically, upon information and belief, Defendant utilized a
18 combination of hardware and software systems to send the text messages at issue in this
19 case. The systems utilized by Defendant have the current capacity or present ability to
20 store numbers using a random or sequential generator, and to dial such numbers.
21 Additionally, the equipment used by Defendant has the capacity to dial numbers from a
22 list of numbers, automatically without human intervention.
23
24

25 42. In fact, Defendant admits that it sends automatic marketing offers on
26 its own website:
27
28

Meet AutoPilot

AutoPilot is the tool at the heart of the Fivestars program, sending your customers the targeted offers they'll love—totally automatically. We designed AutoPilot explicitly for the needs of local businesses (and their time-strapped owners) to deliver the perfectly-timed nudges that get customers coming back and spending more.

43. Below is another image, wherein Defendant acknowledges that they “automatically send campaigns” through their Autopilot feature including “app notification, **text message**, or email, which is “10x more effective than other **marketing tools**.”

We automatically send campaigns that are 10X more effective

Our AutoPilot feature automatically sends your customers an app notification, text message, or email with special offers that bring them back 10x more effectively than other marketing tools

10x
more effective than
traditional marketing

Paid Search Ads Direct Mail Email Fivestars

3

44. In the “Legal” section of its website, Defendant again admits that it uses automated technology to transmit text messages to consumers: “you agree that we and Rewards Providers may communicate with you by automated SMS, MMS, text message or other electronic means to your mobile device and that information about

³ Fivestars, How It Works, <https://www.fivestars.com/businesses/how-it-works/> (last visited March 7, 2018).

1 your usage of the Mobile Services may be communicated to us.”

2
3 45. Defendant’s unsolicited text messages caused Plaintiff actual harm,
4 including invasion of her privacy, aggravation, annoyance, intrusion on seclusion,
5 trespass, and conversion. Defendant’s text messages also inconvenienced Plaintiff and
6 caused disruption to her daily life.
7

8 CLASS ALLEGATIONS

9 PROPOSED CLASS

10
11 46. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P.
12 23, on behalf of herself and all others similarly situated.

13 47. Plaintiff brings this case on behalf of a Class defined as follows:

14
15 **All persons within the United States who, within**
16 **the four years prior to the filing of this Complaint,**
17 **were sent a text message, from Defendant or**
18 **anyone on Defendant’s behalf, to said person’s**
19 **cellular telephone number, for the purpose of**
20 **promoting Defendant’s and/or Defendant’s**
21 **clients’ property, goods, and/or services, without**
22 **their prior express written consent.**

23 48. Defendant and its employees or agents are excluded from the Class.
24 Plaintiff does not know the number of members in the Class, but believes the Class
25 members number in the several thousands, if not more.

26 NUMEROSITY

27 49. Upon information and belief, Defendant has placed automated calls to
28 cellular telephone numbers belonging to thousands of consumers throughout the United

1 States without their prior express consent. The members of the Class, therefore, are
2 believed to be so numerous that joinder of all members is impracticable.

3
4 50. The exact number and identities of the Class members are unknown at
5 this time and can only be ascertained through discovery. Identification of the Class
6 members is a matter capable of ministerial determination from Defendant's call records.

7
8 **COMMON QUESTIONS OF LAW AND FACT**

9 51. There are numerous questions of law and fact common to the Class
10 which predominate over any questions affecting only individual members of the Class.
11 Among the questions of law and fact common to the Class are:
12

- 13 (1) Whether Defendant made non-emergency calls to Plaintiff's and
14 Class members' cellular telephones using an ATDS;
15
16 (2) Whether Defendant can meet its burden of showing that it obtained
17 prior express written consent to make such calls;
18
19 (3) Whether Defendant's conduct was knowing and willful;
20
21 (4) Whether Defendant is liable for damages, and the amount of such
22 damages; and
23
24 (5) Whether Defendant should be enjoined from such conduct in the
25 future.

26 52. The common questions in this case are capable of having common
27 answers. If Plaintiff's claim that Defendant routinely violates the TCPA is correct,
28 Plaintiff and the Class members will have identical claims capable of being efficiently

1 adjudicated and administered in this case.

2 **TYPICALITY**

3
4 53. Plaintiff's claims are typical of the claims of the Class members, as
5 they are all based on the same factual and legal theories.

6 **PROTECTING THE INTERESTS OF THE CLASS MEMBERS**

7
8 54. Plaintiff is a representative who will fully and adequately assert and
9 protect the interests of the Class, and has retained competent counsel. Accordingly,
10 Plaintiff is an adequate representative and will fairly and adequately protect the interests
11 of the Class.
12

13 **PROCEEDING VIA CLASS ACTION IS SUPERIOR AND ADVISABLE**

14 55. A class action is superior to all other available methods for the fair and
15 efficient adjudication of this lawsuit, because individual litigation of the claims of all
16 members of the Class is economically unfeasible and procedurally impracticable. While
17 the aggregate damages sustained by the Class are in the millions of dollars, the individual
18 damages incurred by each member of the Class resulting from Defendant's wrongful
19 conduct are too small to warrant the expense of individual lawsuits. The likelihood of
20 individual Class members prosecuting their own separate claims is remote, and, even if
21 every member of the Class could afford individual litigation, the court system would be
22 unduly burdened by individual litigation of such cases.
23
24
25

26 56. The prosecution of separate actions by members of the Class would
27 create a risk of establishing inconsistent rulings and/or incompatible standards of
28

conduct for Defendant. For example, one court might enjoin Defendant from performing the challenged acts, whereas another may not. Additionally, individual actions may be dispositive of the interests of the Class, although certain class members are not parties to such actions.

COUNT I
Violations of the TCPA, 47 U.S.C. § 227(b)
(On Behalf of Plaintiff and the Class)

57. Plaintiff re-alleges and incorporates the foregoing allegations as if fully set forth herein.

58. It is a violation of the TCPA to make “any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice...to any telephone number assigned to a...cellular telephone service....” 47 U.S.C. § 227(b)(1)(A)(iii).

59. “Automatic telephone dialing system” refers to any equipment that has the “capacity to dial numbers without human intervention.” *See, e.g., Hicks v. Client Servs., Inc.*, No. 07-61822, 2009 WL 2365637, at *4 (S.D. Fla. June 9, 2009) (citing FCC, In re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991: Request of ACA International for Clarification and Declaratory Ruling, 07–232, ¶ 12, n.23 (2007)).

60. Defendant – or third parties directed by Defendant – used equipment having the capacity to dial numbers without human intervention to make non-emergency

1 telephone calls to the cellular telephones of Plaintiff and the other members of the Class.

2
3 61. These calls were made without regard to whether Defendant had first
4 obtained express written consent to make such calls. In fact, Defendants did not have
5 prior express written consent to call the cell phones of Plaintiff and Class Members when
6 the subject calls were made.
7

8 62. Defendant violated § 227(b)(1)(A)(iii) of the TCPA by using an
9 automatic telephone dialing system to make non-emergency telephone calls to the cell
10 phones of Plaintiff and the other members of the putative Class without their prior
11 express consent.
12

13 63. As a result of Defendant's conduct, and pursuant to § 227(b)(3) of the
14 TCPA, Plaintiff and the other members of the putative Class were harmed and are each
15 entitled to a minimum of \$500.00 in damages for each violation. Plaintiff and the class
16 are also entitled to an injunction against future calls.
17

18 **WHEREFORE**, Plaintiff, Allison Fejeran, on behalf of herself and the other
19 members of the Class, pray for the following relief:
20

- 21 a. A declaration that Defendant's practices described herein violate the
22 Telephone Consumer Protection Act, 47 U.S.C. § 227;
23
24 b. A declaration that Defendant's violations of the Telephone Consumer
25 Protection Act, 47 U.S.C. § 227, were willful and knowing;
26
27 c. An injunction prohibiting Defendant from using an automatic telephone
28 dialing system to call and text message telephone numbers assigned to

cellular telephones without the prior written express permission of the
called party;

c. An award of actual and statutory damages; and

d. Such further and other relief the Court deems reasonable and just.

JURY DEMAND

Plaintiff and Class Members hereby demand a trial by jury.

DOCUMENT PRESERVATION DEMAND

Plaintiff demands that Defendant take affirmative steps to preserve all records,
lists, electronic databases or other itemization of telephone or fax numbers
associated with the Defendant and the communication or transmittal of
advertisements as alleged herein.

///

///

1 Date: May 29, 2018

Respectfully submitted,

2
3 /s/ Todd M. Friedman

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2 United States District Court CM/ECF system.

3 Notification sent electronically on this 29th Day of May, 2018, to:

4
5 Honorable James Donato
6 United States District Court
7 Northern District of California

8 And All Counsel of Record as Recorded On The Electronic Service List

9
10 /s/ Todd M. Friedman, Esq.
11 TODD M. FRIEDMAN
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